September 5, 2006

Kent County - Civil Division (739-7641)

Ms. Nancy V. Willing 5 Francis Circle Newark, DE 19711

**RE:** Freedom of Information Act Complaint

**Against New Castle County Council Economic Development Subcommittee** 

Dear Ms. Willing:

On July 21, 2006, we received your complaint alleging that the New Castle County Council Economic Development Subcommittee ("the Subcommittee") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), by denying you the opportunity to speak at a public meeting on June 19, 2006.

By letter dated July 27, we asked the Subcommittee to respond to your complaint by August 7, 2006. We granted the Subcommittee's request for a brief extension of time, and received the Subcommittee's response on August 11, 2006.

The Subcommittee provided us with a copy of the agenda and minutes for its June 19, 2006 meeting and a CD-ROM recording of the meeting. The agenda listed four topics for discussion: "Steve Lefebvre, Exec. V.P., Home Builders Association of Delaware . . . will address Council on the issue of Open Space and the new State Resources Areas"; "John Hughes, Secretary of DNREC,

and Robert Zimmerman, Director of External Affairs, DNREC will address Council on the issue of Open Space and the new Resource Areas"; "Karl Kallbacher, NCC Economic Redevelopment Director will update Council"; and "NCC Economic Development Council update. Speaker: Dale Ervin, Executive Director." The agenda did not provide for any period of public commentary.

According to the Subcommittee, at the start of the June 19, 2006 meeting

Subcommittee chairman Councilman Robert Weiner noted that none of the four individuals [Lefebrve, Hughes, Zimmerman, and Kallbacher] who were listed on the agenda as being scheduled to make presentations at the Meeting were in attendance. Chairman Weiner invited County Chief Administrative Officer, David Singleton, County Department of Land Use General Manager, Charles Baker, Brad Killian, Director of Projects and Planning for Delaware Greenways and Dale Ervin, Director of NCC Economic Development to join the Subcommittee members who were present at the conference room table.

The minutes of the June 19, 2006 meeting show that Messrs. Ervin, Killian, and Baker discussed various development issues including Smart Growth, Delaware Greenway's plan for southern New Castle County, and the Land Protection Act. According to the Subcommittee, each of these invitees "was questioned only by members of the Subcommittee. At no time was the Meeting opened to the public for questions or comments. Although Councilman Weiner had entertained the idea of opening the Meeting to the public, he did not do so because of time considerations."

The CD-ROM recording of the June 19, 2006 confirms that the Subcommittee never opened up the meeting for public commentary. Councilman Weiner invited Messrs. Singleton, Baker,

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Killian, and Ervin to join the other members of the Subcommittee for a "round table" discussion of open space issues. About thirty minutes into the meeting, Councilman Weiner stated: "Before we open up to the public, I want to get input from the administration, from David Singleton and Charlie Baker on how the economic incentives tend to preserve open space in compact development and the relationship of the Comprehensive Plan." After thirty minutes of round table discussion, Councilman Clark moved to adjourn the meeting. At that point, you asked to be recognized to speak. The Subcommittee decided not to hear from you or any other members of the public and voted to adjourn.

## **LEGAL ANALYSIS**

Our Office has "determined that there is a nexus between the procedural requirements of the open meeting laws, and the First Amendment right of free speech." *Att'y Gen. Op.* 05-IB01 (Jan. 23, 2005). FOIA does not require a public body to allow citizens to comment at a public meeting, but "'[i]f a public body chooses to allow public participation in a meeting' it cannot discriminate on the basis of the content of the speech . . . First Amendment rights of free speech 'inhere in the definition of an 'open meeting' under Delaware's FOIA when a public body allows for a period of public participation.'" *Att'y Gen. Op.* 05-IB01 (quoting *Att'y Gen. Op.* 03-IB06 (rev. Feb. 11, 2003)). *Accord Reeder v. Delaware Department of Insurance*, C.A. No. 1553-N, Mem. Op. at pp. 26, 27 (Del. Ch., Feb. 24, 2006) ("FOIA does not mandate that public bodies allow for public comments" but if they do they cannot "act arbitrarily or invidiously against citizens who attend their meetings").

"'Under the test 'for reviewing limited forum restrictions, content-based restraints are permitted, so long as they are designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Att'y Gen. Op.* 05-IB01 (quoting *Eichenlaub v. Township of Indiana*, 2004 WL 2093439, at p.4 (3<sup>rd</sup> Cir., Sept. 21, 2004)). Implicit in this concept "is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49 (1983).

In *Perry*, the Supreme Court upheld the school district's policy of granting exclusive access to teachers' mailboxes to the union which was their exclusive collective bargaining representative. "We believe it more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. . . . The touchstone for evaluating these distinctions is whether they were reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49 (footnote omitted).

In *Reeder*, the Defensive Driving Credential Committee held a disciplinary hearing which was open to the public. The "DDCC limited itself to interacting with the charged party and answered questions from the charged party, while declining to hear from members of the public at that stage of the meeting. Nothing in the text of FOIA condemns the distinction the DDCC made, which on its face is a rational one." Mem. Op. at 27-28.

In *Att'y Gen. Op.* 04-IB01 (Jan. 28, 2004), our Office determined that the board of adjustment could limit participation to the parties and their counsel and did not have to allow members of the

general public to speak. <sup>1</sup> In *Att'y Gen. Op.* 04-IB13 (June 1, 2004), our Office determined that "the Planning Commission acted reasonably and consistent with FOIA when it gathered information from current and former owners of the property at issue as part of the Commission's factfinding process, without allowing general commentary from the public at large."

Att'y Gen. Op. 05-IB01, which you rely on in your complaint, is inapposite. The agenda for the school board's meeting provided for a period of public commentary (two minutes per speaker). The board president cut off one of the speakers when he began to comment on certain personnel matters with the intent to identify the employees by name. Our Office determined that the "restriction on your speech was not 'viewpoint neutral' and was not 'reasonable in light of the purpose served by the forum.'" *Id.* (quoting *Eichenlaub*, 2004 WL 2093439, at p.4). The "School Board violated FOIA when, after inviting the public to speak, it tried to restrict [a citizen's] speech based on its content." *Att'y Gen. Op.* 05-IB01.

At its meeting on June 19, 2006, the Subcommittee did not open the meeting for public comment and discriminate against the content of any citizen's viewpoint. The persons invited to speak were all public officials who spoke in that capacity and not as members of the general public. The Subcommittee invited them to speak "based on their *status* . . . rather than their views." *Perry Education Association*, 460 U.S. at 49. We believe that the Subcommittee reasonably limited the speakers at the June 19, 2006 in keeping "with the intended purpose of the [meeting]." *Id*.

In *Att'y Gen. Op.* 04-IB01, counsel for one of the parties was not able to attend the zoning hearing and a citizen argued the case on behalf of the homeowners association. We determined that, under those circumstances, the board of adjustment opened the meeting to public comment and could not pick and choose which citizens could speak.

We also determine that the Subcommittee did not violate the public notice requirements of FOIA by substituting speakers during the June 19, 2006 meeting. In *Att'y Gen. Op.* 03-IB16 (July 14, 2003), the school board's agenda listed for public discussion a new superintendent. When it turned out, at the time of the meeting, that there was no new information to share with the public, the school board changed the agenda to conduct a workshop on the selection process. Our Office determined that the school board did not violate "FOIA by changing the agenda to include a workshop on the selection process, particularly since this matter was closely related to the public business that was properly noticed to the public in advance and did not result in any official action on an important matter of public concern."

FOIA permitted the Subcommittee to include additional items to the agenda "which arise at the time of the public body's meeting." 29 *Del. C.* §10004(e)(2). We believe that the Subcommittee properly added substitute speakers at its June 19, 2006 meeting after it realized that several of the guest speakers were not able to attend.

## **CONCLUSION**

For the foregoing reasons, we determine that the Subcommittee did not violate FOIA by denying you an opportunity to speak at a meeting on June 19, 2006. FOIA did not require the Subcommittee to give you an opportunity to speak at that meeting. The Subcommittee never opened

In *Att'y Gen. Op.* 03-IB16, we noted "that the proper procedure for amending the agenda under FOIA is by motion and vote in public at the time the public body adds or deletes an agenda item. It is not clear from the record whether the [school board] did that, but it should in the future."

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up the meeting for public comment or discriminate as between individual members of the public

based on their viewpoint. The Subcommittee reasonably limited the persons invited to speak to

public officials based on their status and not on the content of their views.

Very truly yours,

W. Michael Tupman Deputy Attorney General

**APPROVED** 

Lawrence W. Lewis, Esquire

**State Solicitor** 

cc: The Honorable Carl C. Danberg Attorney General

> Malcolm S. Cobin, Esquire Chief Deputy Attorney General

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